Masteron Sdn Bhd v Abdul Aziz bin Abdul Halim & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-341 OF 1996
KAMALANATHAN RATNAM J
16 JULY 1999

Land Law *— Sale of land — Power of attorney — Whether power of attorney lapses after prior disposal of subject matter by donor — Power of Attorney Act 1949 ss 5 & 6*

The plaintiff entered into a sale and purchase agreement on 12 July 1995 for a piece of land known as Lot 25 with the first defendant and one Fathiah, who were the joint attorneys of the fifth defendant, who had earlier entered into a sale and purchase agreement with one Lim on 28 January 1994 for RM850,000. The plaintiff's sale and purchase agreement was terminated on 1 December 1995 due to the fifth defendant's non-compliance of the special conditions in the agreement. The plaintiff brought a claim for the refund of RM60,020.21 against the defendants. Having obtained judgment in default against the first to third defendants and a consent judgment on the sixth defendant, pending the service of the summons on the fourth defendant, the plaintiff proceeded against the fifth defendant. The main dispute in this case involved the validity and the effect of the irrevocable power of attorney dated 20 August 1986 given by the fifth defendant to the first defendant and Fathiah.

Held, allowing the plaintiff's claim:

(1) At the time the sale and purchase agreement was entered into, the power of attorney was subsisting and valid as the fifth defendant had himself admitted that he voluntarily executed the power of attorney and that he had not lodged any notice of revocation of the same. Further, the power of attorney was stated to be irrevocable. In the circumstances, for the fifth defendant to allege that the power of attorney had lapsed automatically because of the sale and purchase agreement with Lim on 28 January 1994, was to suspend the exercise of reason (see pp 61F–G, 63E).

(2) As such, the fifth defendant had entered into an agreement with the plaintiff as principal and had through the power of attorney appointed the first defendant and Fathiah as his agents and that he had voluntarily conferred upon them the authority and power to sell Lot 25 to any person and to execute the memorandum of transfer in respect of the said sale (see p 62E–F).

(3) Further, as the fifth defendant had enriched himself by a profit of RM325,000, whereas the wronged party has indeed suffered a loss of RM60,020.21, equity would rise against such unjust enrichment and the court would not allow the fifth defendant to benefit and reap a profit out of a wrong done to the plaintiff (see p 64B–C).

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian jual beli pada 12 Julai 1995 untuk sebidang tanah dikenali sebagai Lot 25 dengan defendan pertama dan seorang bernama Fathiah, yang merupakan peguam bersama defendan kelima, yang telah terdahulu memasuki satu perjanjian jual beli dengan seorang bernama Lim pada 28 Januari 1994 untuk RM850,000. Perjanjian jual beli plaintif telah ditamatkan pada 1 Disember 1995 disebabkan oleh ketidakpatuhan defendan berkenaan syarat-syarat khas di dalam perjanjian tersebut. Plaintif telah memulakan satu tuntutan bayaran balik berjumlah RM60,020.21 terhadap defendan-defendan. Setelah memperoleh penghakiman ingkar terhadap defendan-defendan pertama hingg ketiga dan satu penghakiman persetujuan ke atas defendan keenam, sementara menunggu serahan saman-saman ke atas defendan keempat, plaintif telah meneruskan tindakan terhadap defendan kelima. Pertikaian utama di dalam kes ini melibatkan kesahan dan kesan surat kuasa wakil yang tidak boleh dibatalkan bertarikh 20 Ogos 1986 yang diberikan oleh defendan kelima kepada defendan pertama dan Fathiah.

Diputuskan, membenarkan tuntutan plaintif:

(1) Pada masa perjanjian jual beli tersebut dimasuki, surat kuasa wakil itu masih berterusan dan sah kerana defendan kelima sendiri telah membuat pengakuan bahawa beliau telah suka rela menyempurnakan surat kuasa wakil itu dan bahawa beliau tidak memfailkan apa-apa notis pembatalan yang demikian. Selanjutnya, surat kuasa wakil itu dinyatakan sebagai tidak boleh batal. Di dalam keadaan ini, bagi defendan kelima mendakwa bahawa surat kuasa wakil itu telah luput serta merta kerana perjanjian jual beli dengan Lim pada 28 Januari 1994 ke, adalah untuk menggantung pelaksanaan kemunasabahan (lihat ms 61F–G, 63E).

(2) Oleh yang demikian, defendan kelima telah memasuki satu perjanjian dengan plaintif sebagai prinsipal dan telah melalui surat kuasa wakil melantik defendan pertama dan Fathiah sebagai ejen-ejen beliau dan bahawa beliau telah secara suka rela memberikan kepada mereka autoriti dan kuasa untuk menjual Lot 25 kepada mana-mana orang dan untuk menyempurnakan memorandum pemindahan berhubung dengan penjualan tersebut (lihat ms 62E–F).

(3) Selanjutnya, oleh kerana defendan kelima telah mengayakan diri beliau dengan keuntungan sebanyak RM325,000, sementara pihak yang dipersalahkan sememangnya telah mengalami kerugian sebanyak RM60,020.21, ekuiti akan timbul terhadap pengayaan yang tidak adil sebegini dan mahkamah tidak akan membenarkan defendan kelima untuk mendapatkan faedah dan mengaut keuntungan daripada kesalahan yang dibuat ke atas plaintif (lihat ms 64B–C).]

Notes

For a case on power of attorney, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) para 3105.

Cases referred to

Sheriffa Shaikhah v Ban Hoe Seng & Co Ltd [1963] MLJ 241 (refd)

Legislation referred to

Contracts Act 1950 ss 135, 140
Power of Attorney Act 1949 ss 5, 6

Goh Siu Lin (*Shook Lin & Bok*) for the plaintiff.
Mohd Badrillan Haji Abdullah (*Yacob & Rakan-Rakan*) for the fifth defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff's claim herein is for the refund of monies totalling RM60,020.21 paid by the plaintiff to the fifth defendant pursuant to a sale and purchase agreement ('the said agreement') for the purchase of lands of which one involved a piece of land with Certificate of Title No 19963, Lot No 25, Seksyen 85A, in the Town of Kuala Lumpur, District and State of Kuala Lumpur ('Lot 25'). The purchase price of the said Lot 25 was RM687,828.

The plaintiff first met the first defendant on or about 20 May 1995 to negotiate the purchase of lands, one of which was Lot 25. The first defendant had conducted negotiations on behalf of Fathiah bte Abdul Halim ('Fathiah') and himself (the joint holders of a power of attorney granted by the fifth defendant) which led to the execution of the said agreement on 12 July 1995.

Consequently, the plaintiff's solicitors conducted the customary land searches with the land office and queried the first defendant regarding the existence of a private caveat entered on Lot 25. The first defendant explained that the reason for the existence of the said caveat was to prevent foreclosure proceedings commenced by one Fleet Management Sdn Bhd. The first defendant further stated that the foreclosure proceedings would be resolved and the caveat withdrawn as it was entered by a friendly party, one Lim Siew Wah @ Lim Tian Wah ('Lim') for the purposes of delaying the foreclosure proceedings commenced by Fleet Management Sdn Bhd. In actual fact the fifth defendant had entered into a sale and purchase agreement on 28 Janaury 1994 with Lim for the sale of Lot 25 for a sum of RM850,000 and it was because of this agreement that Lim had entered a caveat.

On 1 December 1995, the said agreement was terminated by the plaintiff as a result of the fifth defendant's non-compliance with the special

conditions in the said agreement. The plaintiff demanded of the fifth defendant, a full refund of all monies paid pursuant to the said agreement. The fifth defendant's solicitors had agreed to withdraw the caveat lodged on Lot 25 by Lim and by the two donees of the power of attorney, by a fixed time but failed to do so.

The special conditions

The special conditions are particularized in cl 4 of the said agreement. Clause 4 reads as follows:

Special Conditions

4 The parties hereto agree that notwithstanding anything contained in this agreement, completion of this agreement shall be subject to the following:

(i) The parties hereto agree and understand that the purpose of this transaction is to enable the purchaser to submit to the state authority an application to amalgamate the said property with the properties held under the titles and particulars as described in Sch 1 annexed hereto ('the other properties') with a view to joint development of the said property and the other properties.

(ii) The due completion of the related agreements pertaining to the sale and purchase of the other properties.

(iii) The vendor shall ensure that the development order from DBKL issued in respect of the said property, details of which are shown in Sch 2 annexed hereto ('the development order') shall be valid until the transfer of the said property and the other properties whereupon the vendor shall procure that the development order shall be vested in the purchaser's name.

(iv) The vendor shall furnish the purchaser with the original letter from the relevant state authority approving and consenting to such application to reinstate/convert the status of the title of Lot 121 from leasehold to freehold on or before the completion date or the extended period.

(v) The vendor shall secure the undated and unqualified letter of release of the vendor's architect presently involved in the development and the said property subject to the vendor being responsible for all the said architect's costs incurred up to the date of this agreement.

(vi) The purchaser's solicitors shall have received from the vendor's solicitors, the grant of letters of administration, the vesting order and a CTC of the order of court approving the sale of Lot 121, Section 85A, Jalan Pahang, Kuala Lumpur ('Lot 121').

(vii) The purchaser's solicitors shall have received from the vendor's solicitors a certified true copy of the grant of letters of administration to a lawful administrator of the estate of Ismail bin Hj Mohd Bakri (d), one of the beneficiaries of the estate who has since passed away, the vesting order and the relevant certified true copy of the order of court approving the sale and/or dealing of the part of the interest in Lot 121 vesting in the said Ismail bin Hj Mohd Bakri (d).

(viii) The vendor shall ensure and cause the removal of all caveats referred to in preamble 4 hereto before the completion date or the extended period.

Provided always that in the event on the non-performance, non-completion or in default of any of the provisions herein, the purchaser shall be at liberty to

A treat this agreement and all other related agreements in respect of the other properties as terminated whereupon the vendor shall forthwith refund to the purchaser all monies paid to the purchaser or on the purchaser's behalf pursuant to cl 2 hereof and the parties hereto shall have no further claims against each other save for any antecedent breach in existence at the material time, and provided always that the vendor may request for a further period of
B two (2) months from the completion date or the extended date ('the vendor's extension period') as the case may be within which to fulfil the provisions of this clause which consent for extension shall not be unreasonably withheld by the purchaser, and provided always that the purchaser will not be required to pay any interest on the vendor's extension period.

C *The dispute*

The main dispute in this case involves the validity and effect of an irrevocable power of attorney ('PA') dated 20 August 1986, registered with the High Court of Kuala Lumpur, granted by the fifth defendant to the first defendant and Fathiah. In relation thereto, the issue before this court is
D whether they were authorized to enter into the said agreement with the plaintiff for the sale of Lot 25.

Findings of the court

The power of attorney

E

The plaintiff had already obtained judgment in default as against the first to third defendants. The summons has yet to be served on the fourth defendant and consent judgment has been entered against the sixth defendant. The case therefore only proceeded against the fifth defendant.

F PW1, the Managing Director of the plaintiff, testified that the plaintiff had entered into the said agreement with the fifth defendant based on the irrevocable PA conferred by the fifth defendant upon his two attorneys. It is a fact that at the time the said agreement was entered into, the PA was subsisting and valid and continued to be registered with the High Court at Kuala Lumpur and that it had not been revoked. It is pertinent to note that
G the fifth defendant had executed the said PA voluntarily and that he is related to the first defendant, who is an advocate and solicitor, and to Fathiah by marriage in that the fifth defendant married Fathiah, the sister of the first defendant. In any case the fifth defendant himself admitted that he voluntarily executed the said PA and that he has not to date lodged any notice of revocation of the same. The fifth defendant admitted under cross-
H examination that he was the registered owner of Lot 25 at the time the said agreement was signed. The plaintiff paid a total sum of RM60,020.21 in respect of Lot 25, particulars of which are as follows:

	Item	RM
I	(i) Earnest monies	3,567.00
	(ii) Securing and Maintaining Development Order	47,296.00
	(iii) Late payment interest levied by DBKL	7,107.21

(iv)	Assessment for Lot 25	2,050.00
	Total	60,020.21

The earnest money amounting to RM3,567 was paid to the fifth defendant's solicitors, Aziz Halim & Co, and the first defendant was practising as a solicitor in Aziz Halim & Co.

The fifth defendant who gave evidence as DW1 admitted under cross-examination that as a result of the subsequent sale to Lim he made a clean profit of RM325,000.

First defendant and Fathiah, agent of the fifth defendant

I have no hesitation in finding that the first defendant and Fathiah were the agents of the fifth defendant when they entered into the said agreement with the plaintiff and that they were authorized by the said PA to do so and to receive payment of monies on the fifth defendant's behalf under the PA.

Section 135 of the Contracts Act 1950 ('the Act') defines an agent as 'a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.

Section 140 of the Act states that an authority is said to be express when it is given by words spoken or written and an authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

I therefore find that the fifth defendant as principal had expressly and in writing, by way of the PA, appointed the first defendant and Fathiah as his agents and that he had voluntarily conferred upon them the authority and power to sell Lot 25 to any person and to execute the memorandum of transfer in respect of the said sale. I therefore have no hesitation in holding that the said sale and purchase agreement executed by the donees of the PA is properly executed in the name of the principal, that is, the fifth defendant.

Section 5 of the Powers of Attorney Act 1949 reads as follows:

> Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a Senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy.

It is therefore the clear intention of parliament that a PA once registered with the High Court remains valid and continues to be in force until revoked by the donor. Since there is no evidence before me that the fifth

A defendant had revoked the said PA, I hold that the said PA is still in force and was in force when the sale and purchase agreement with the plaintiff was executed.

Section 6 of the Powers of Attorney Act 1949 reads as follows:

> (1) If a power of attorney, given for valuable consideration, is in the
> B instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
> C (b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
> D (c) neither the donee of the power, nor the purchaser, shall at anytime be prejudicially affected by the notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

It is clear that the said PA is stated to be irrevocable. It is also obvious that
E the fifth defendant cannot even revoke the grant of the said PA against the donees without the donees' consent. In the circumstances, for the fifth defendant to allege that the said PA had lapsed automatically because of the sale and purchase agreement with Lim on 28 January 1994, is to suspend the exercise of reason.

F It is axiomatic that a court will construe a power of attorney strictly. Since the PA has expressly authorized the two donees to sell Lot 25, execute all relevant documents to make the sale effective and to receive payment of monies on behalf of the fifth defendant it is my judgment that all payments made by the plaintiff to the donees of the PA pursuant to the agreement, were effective to discharge their obligations under the agreement.

G In *Sheriffa Shaikhah v Ban Hoe Seng & Co Ltd* [1963] MLJ 241 Ambross J said at pp 243I–244A:

> ... Estoppel by negligence is a type of estoppel in which the party in whose favour it operates is the victim of the fraud of some third person facilitated by a breach of duty of care on the part of the party against whom it operates.
> H Before anyone can be estopped by negligence, he must owe a duty to use due care towards the party misled, or towards the general public of which he is one.

It is obvious that the fifth defendant owed a duty of care to the plaintiff by virtue of conferring a widely worded power of attorney to the donees, and failing to take any steps to give notice to the world at large of his intention
I to revoke the said PA. The plaintiff having thus acted on the representation of the fifth defendant, must succeed against the fifth defendant for the acts of his donees of the PA.

Unjust enrichment

Another factor that I must consider is that due to the improper conduct of the fifth defendant in entering into an agreement with Lim which he had no power to do, until the PA granted to the first defendant and to Fathiah was revoked, and whilst the agreement with the plaintiff signed by the said donees of the PA was still in existence, the fifth defendant had enriched himself by a profit of RM325,000, whereas the wronged party has indeed suffered a loss of RM60,020.21. Surely every sinew of equity will rise against such unjust enrichment. The majestic figure of justice, blindfolded and holding aloft the scales, will crumble in shame, at such inequity. This court must never allow the fifth defendant to benefit and reap a profit out of a wrong done to the plaintiff. Since there is no dispute as to the sum of RM60,020.21, I enter judgment for the plaintiff against the fifth defendant in the sum of RM60,020.21 with interest at 6% per annum from the date of service of the writ to date of judgment and costs.

Plaintiff's claim allowed.

Reported by Chin En Tek